

COTTONWOOD HEIGHTS

RESOLUTION NO. 2012-29

A RESOLUTION APPROVING A CIVIL LEGAL SERVICES AGREEMENT WITH WM. SHANE TOPHAM

WHEREAS, the city council (the "*Council*") of the city of Cottonwood Heights (the "*City*") met in regular session on 26 June 2012 to consider, among other things, approving a civil legal services agreement (the "*Agreement*") with Wm. Shane Topham ("*Attorney*") whereunder Attorney would provide civil legal services to the City as its city attorney during the City's 2012-16 fiscal years; and

WHEREAS, the Council has reviewed the form of the Agreement, a photocopy of which is annexed hereto; and

WHEREAS, after careful consideration, the Council has determined that it is in the best interests of the health, safety and welfare of the citizens of the City to approve the City's entry into the Agreement as proposed;

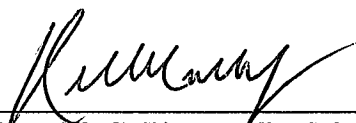
NOW, THEREFORE, BE IT RESOLVED by the Cottonwood Heights city council that the attached Agreement is hereby approved, and that the City's mayor and recorder are authorized and directed to execute and deliver the Agreement on behalf of the City.

This Resolution, assigned no. 2012-29, shall take effect immediately upon passage.

PASSED AND APPROVED effective 26 June 2012.

COTTONWOOD HEIGHTS CITY COUNCIL



By 
Kelvyn H. Cullimore, Jr., Mayor


Linda W. Dunlavy, Recorder

VOTING:

Kelvyn H. Cullimore, Jr.	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
Michael L. Shelton	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
J. Scott Bracken	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
Michael J. Peterson	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>
Tee W. Tyler	Yea <input checked="" type="checkbox"/>	Nay <input type="checkbox"/>

DEPOSITED in the office of the City Recorder this 26th day of June 2012.

RECORDED this ___ day of June 2012.

580744.1

Civil Legal Services Agreement

THIS AGREEMENT (this "*Agreement*") is entered into effective 1 July 2012 between **COTTONWOOD HEIGHTS**, a Utah municipality ("*City*") and **Wm. SHANE TOPHAM**, an attorney licensed to practice law in the state of Utah ("*Attorney*").

RECITALS:

A. Attorney is in the business of providing legal services to the public. Attorney currently is a shareholder of and performs legal services through the law firm of Callister Nebeker & McCullough, a professional corporation; provided, however, that Attorney freely may terminate his affiliation with such firm; change the nature of his affiliation with such firm; affiliate with another firm; or perform the Legal Services (defined below) hereunder independently. The law firm or other business entity or arrangement through which Attorney now or hereafter provides the Legal Services to the City hereunder is referred to herein as the "*Firm*".

B. City is in need of legal services.

C. City desires to enter into a service contract with Attorney for legal services and to appoint Attorney as City's "City Attorney."

D. The parties have determined that it is mutually advantageous to enter into this Agreement.

AGREEMENT:

NOW, THEREFORE, in consideration of the premises, mutual covenants and undertakings, the parties hereby agree as follows:

1. Scope of Services to be Provided. Attorney shall furnish all civil legal services required by City (the "*Legal Services*") from 1 July 2012 until termination of this Agreement. The Legal Services shall include, without limitation, identifying potential legal issues; proposing resolution thereof; attending all city council business meetings and work sessions; attending all planning commission business meetings and work sessions; attending all board of adjustment business meetings and work sessions; providing advice concerning land use issues affecting City; providing training and legal advice to City's land use commissions and boards as requested; responding to legal inquiries by City officers and staff concerning City matters; assisting City's land use staff to develop or refine City's land use ordinances, bond requirements, capital facilities and impact fee studies and plans, and related work; assisting in ordinance enforcement, as requested by City officers and staff; protecting and maintaining the integrity of City; and resolving such other legal issues and providing such other legal services as Attorney and City deem reasonably necessary for the proper functioning of City. Provision of the Legal Services by Attorney and the Firm shall at all times be subject to all applicable laws, rules and regulations, including, without limitation, the Rules of Professional Conduct ("*RPC*") adopted by the Utah Supreme Court from time to time in effect in the State of Utah, as well as such other professional standards and practices as may, from time to time, be applicable.

2. Fees. Fees will be determined primarily by the time expended by Attorney and other attorneys, law clerks and paralegals employed by the Firm that may assist in performing the Legal Services. Each month Attorney, through the Firm, shall provide City with an invoice for each active matter setting forth advanced costs and a detailed description of the Legal Services rendered during the preceding period, billed in one-tenth hour increments. Attorney's hourly rate shall not exceed \$170.00 per hour during the first year of this Agreement. During subsequent years of this Agreement, Attorney's hourly rate shall be increased, upon notice to City, in accordance with intervening increases in the Consumer Price Index ("CPI"), with the applicable hourly rate adjusted (up or down) to the nearest \$5 increment. (For example, if, as of the first anniversary of this Agreement, Attorney's CPI-adjusted hourly rate is \$172.50, then Attorney's hourly rate for year two of this Agreement would remain \$170.00, but if such CPI-adjusted hourly rate is \$172.51, then Attorney's hourly rate would increase to \$175.00 during year two). Attorney also shall be entitled to reimbursement of any actual, out-of-pocket costs necessarily advanced by in performance of the Legal Services in accordance with City's reimbursement policies.

3. Annual Budget. City's approved budget for each fiscal year shall include a reasonable pre-estimate of the fees for anticipated Legal Services during such fiscal year, reasonably based on prior years' budgeted amounts and anticipated workflow for the upcoming fiscal year. Attorney shall use his diligent best efforts to assure that the fees charged for such fiscal year do not exceed the budgeted amount, subject to unanticipated occurrences and City's legal needs in response to those occurrences, as directed by the City's manager and/or city council.

4. Term; Non-Funding. This Agreement shall be effective as of 1 July 2012 and shall terminate on 30 June 2016. Attorney acknowledges, however, that funds are not presently available for City's performance of this Agreement beyond the end of City's current fiscal year, which is 30 June 2013. City's obligation for performance of this Agreement beyond that date is contingent upon funds being appropriated for payments due under this Agreement for subsequent fiscal years.

If no funds or insufficient funds are appropriated and budgeted in any fiscal year, or if there is a reduction in appropriations due to insufficient revenue, resulting in insufficient funds for payments due or about to become due under this Agreement, then this Agreement shall create no obligation on City as to such fiscal year (or any succeeding fiscal year), but instead shall terminate and become null and void on the first day of the fiscal year for which funds were not budgeted and appropriated or in the event of reduction in appropriation, on the last day before the reduction becomes effective (except as to those portions of payments herein then agreed upon for which funds are appropriated and budgeted).

If City does not appropriate funds for the same or similar type of services as the Legal Services hereunder, then said termination shall not be construed as a breach of or default under this Agreement and said termination shall be without penalty, additional payment, or other charges of any kind whatsoever to City, and no right of action or damages or other relief shall accrue to the benefit of Attorney as to this Agreement, or any portion thereof, which may so terminate and become null and void. If, however, City does thereafter appropriate funds for the same or similar type of services as the Legal Services hereunder, then said termination shall be construed as a breach of or default under this Agreement and shall be subject to any and all legal and equitable remedies.

5. Assignment and Delegation. Attorney shall not assign or delegate the performance of his duties under this Agreement without City's prior approval; provided, however, that Attorney may utilize the services of other attorneys or paralegals in the Firm to assist Attorney in providing the Legal Services hereunder, as reasonably deemed appropriate by Attorney in his professional judgment.

6. Employment Status.

(a) Status. In performing the Legal Services, Attorney shall at all times be an independent contractor, and not an employee, of City. Attorney shall have complete control and discretion over all Firm personnel providing the Legal Services. All such personnel shall be and remain employees of the Firm and shall be considered to be independent contractors in the same manner as Attorney.

(b) Salary and Wages. Except for its obligation to satisfy the Firm's monthly invoices as described above, City shall not have any obligation or liability for the payment of any salary or other compensation to Attorney or other personnel providing the Legal Services.

(c) Employment Benefits. All personnel providing the Legal Services are and shall remain employees of the Firm and shall have no right to any City pension, civil service or other benefits pursuant to this Agreement or otherwise.

(d) Errors and Omissions Insurance. Attorney, and all other personnel providing the Legal Services, shall be covered by the Firm's errors and omissions insurance coverage with a liability limit of at least \$1.0 Million.

7. Termination. This Agreement shall be terminated upon the happening of any of the following events:

(a) For Cause. For cause upon twenty (20) days' prior written notice and opportunity to cure by the terminating party where the other party has materially breached any provision of this Agreement or violated any material statutory or common law duty or obligation to the terminating party, including, without limitation, Attorney's failure to substantially perform any of Attorney's material obligations hereunder to the City's reasonable satisfaction at any time;

(b) Without Cause. Without cause at any time upon at least three (3) months' prior written notice by a party to the other. During such three-month notice period (the "3-Month Period"):

(i) Attorney shall continue, and shall be allowed to continue, to provide all Legal Services reasonably required by the City on the same basis as theretofore, with no effort by City to artificially diminish the City's need for Legal Services through deferral of workflow or utilization of other providers; and

(ii) If Attorney is the party terminating this Agreement without cause, then Attorney shall be entitled to payment for the Legal Services rendered as provided in this Agreement; but

(iii) If City is the party terminating this Agreement without cause, then Attorney shall be entitled to payment for the Legal Services rendered during each month of the 3-Month Period in the amount that is the greater of (A) Attorney's actual, reasonable billing for such month, or (B) an amount equal to the average monthly billing by Attorney for Legal Services rendered during all prior months of this Agreement (the "*Average Monthly Billing*").

Further, if City terminates this Agreement without cause, then, in addition to the amounts paid during the 3-Month Period, Attorney shall be entitled to a severance payment equal to 600% (i.e.--six months') of the Average Monthly Billing (the "*Severance Payment*"). The Severance Payment is intended to provide Attorney a reasonable opportunity to transition his workflow to other clients after the loss of a major client through no fault of Attorney. The Severance Payment shall be due and payable as of the end of the 3-Month Period.

(c) Mutual Consent. Whenever City and Attorney mutually agree in writing to terminate this Agreement;

(d) Death. Upon Attorney's death; or

(e) Conduct. If Attorney is convicted of any crime which is classified by the State of Utah as a Class A misdemeanor or greater, or if Attorney violates the RPC and is disbarred, suspended from the practice of law, or publicly reprimanded by the Utah State Bar, a Utah district court and/or the Utah Supreme Court.

8. Notice. Any notice required or permitted to be given hereunder shall be deemed sufficient if given by a communication in writing and shall be deemed to have been received (a) upon personal delivery or actual receipt thereof, or (b) within three days after such notice is deposited in the United States Mail, postage prepaid, and certified and addressed to the parties as set forth below or at such other address(es) as a party may designate in a notice to the other party.

City: COTTONWOOD HEIGHTS
Attn. City Manager
1265 Fort Union Blvd., Suite 250
Cottonwood Heights, UT 84047

Attorney: Wm. Shane Topham
CALLISTER NEBEKER & MCCULLOUGH
10 East South Temple, 9th Floor
Salt Lake City, UT 84133

9. Titles and Captions. All section or subsection titles or captions herein are for convenience only. Such titles and captions shall not be deemed part of this Agreement and shall in no way define, limit, augment, extend or describe the scope, content or intent of any part or parts hereof.

10. Pronouns and Plurals. Whenever the context may require, any pronoun used herein shall include the corresponding masculine, feminine or neuter forms, and the singular form of nouns, pronouns and verbs shall include the plurals and vice versa.

11. Applicable Law. The provisions hereof shall be governed by and construed in accordance with the laws of the state of Utah.

12. Integration. This Agreement constitutes the entire agreement between the parties pertaining to the subject matter hereof, and supersedes all prior agreements and understandings pertaining thereto.

13. Time. Time is the essence hereof.

14. Survival. All agreements, covenants, representations and warranties contained herein shall survive the execution of this Agreement and shall continue in full force and effect throughout the term of this Agreement.

15. Waiver. No failure by any party to insist upon the strict performance of any covenant, duty, agreement or condition of this Agreement or to exercise any right or remedy consequent upon a breach thereof shall constitute a waiver of any such breach or of such or any other covenant, agreement, term or condition. Any party may, by notice delivered in the manner provided in this Agreement, but shall be under no obligation to, waive any of its rights or any conditions to its obligations hereunder, or any duty, obligation or covenant of any other party. No waiver shall affect or alter the remainder of this Agreement but each and every other covenant, agreement, term and condition hereof shall continue in full force and effect with respect to any other then existing or subsequently occurring breach.

16. Rights and Remedies. The rights and remedies of the parties hereto shall not be mutually exclusive, and the exercise of one or more of the provisions of this Agreement shall not preclude the exercise of any other provisions hereof.

17. Severability. In the event that any condition, covenant or other provision hereof is held to be invalid or void, the same shall be deemed severable from the remainder of this Agreement and shall in no way affect any other covenant or condition herein contained. If such condition, covenant or other provision shall be deemed invalid due to its scope or breadth, such provision shall be deemed valid to the extent of the scope or breadth permitted by law.

18. Disclosure and Waiver of Conflict. City acknowledges and agrees that (a) Attorney prepared this Agreement; (b) City has been advised by Attorney that the interest of City and Attorney under this Agreement are opposed to each other; and (c) City has been advised by Attorney to retain separate counsel. Notwithstanding the foregoing, City (x) desires to enter into this Agreement; (y) acknowledges that it has been advised to retain separate counsel and has done so or waives its right to do so; and (z) forever waives any claim that the Attorney's representation of City and Attorney's rights under this Agreement constitute a conflict of interest.

19. Data Device. To assure and facilitate more complete e-mail communication between City and Attorney, City may provide to Attorney a "smart phone" or similar device on the same terms and conditions as to City's other key appointed officers, subject to Attorney's

obligation to reimburse City for any personal usage of such device in accordance with any reimbursement policy adopted from time to time by City.

20. Professional Associations. Attorney shall at his own cost pay Attorney's dues for membership in the Utah State Bar. Attorney also shall at his cost pay Attorney's dues for membership in the Utah Municipal Attorneys Association and participate in the same.

21. Continuing Legal Education. Attorney shall at his own cost pay the necessary expenses incurred by Attorney to maintain or improve Attorney's professional skills and meet the requirements of the Utah State Bar for continuing legal education.

22. Office and Clerk Assistance. City may provide office space, office furniture as it deems appropriate, access to a copy machine and printer, and internet access, but shall not provide office services, clerk, assistance, or other office-type support for Attorney's performance of the Legal Services.

23. Conflicts of Interest. Attorney shall attempt to avoid all conflicts of interest with other clients of Attorney and/or the Firm, and shall comply with the RPC in that respect. Because Attorney will be acting as the official City Attorney for City, he shall also comply in all respects with the Utah Municipal Officers and Employees Ethics Act. Attorney represents and certifies that he has not offered or given any gift or compensation prohibited by law to any City officer or employee to secure favorable treatment with respect to this Agreement.

IN WITNESS WHEREOF, City has caused this Agreement to be signed by its Mayor and attested by its Recorder and delivered; and Attorney has caused the same to be signed and delivered.

ATTEST:

COTTONWOOD HEIGHTS, a Utah municipality

Linda W. Dunlavy, Recorder

By: _____
Kelvyn H. Cullimore, Jr., Mayor

ATTORNEY:

579669.2

Wm. Shane Topham